85-1817

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DEBORAH L. AVERY,
Petitioner,

vs.

ROBERT JENNINGS, JOHN E. HELD,
JOSEPH DeCOURCY, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

To what extent does the First Amendment principle prohibiting political discharge of government employees established in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), apply to political hiring decisions by local elected officials?

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Deborah Avery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Deborah Avery* v. *Robert Jennings, et al.*, entered on March 20, 1986.

OPINIONS BELOW

The opinion of the District Court is reported at 604 F.Supp. 1356 (S.D. Ohio 1985). The opinion of the Court of Appeals has yet to be reported, and is reprinted as Appendix A.

JURISDICTION

The Court of Appeals entered judgment on March 20, 1986. This Court has jurisdiction to review the judgment below under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution, which provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Course Of The Proceedings.

Deborah Avery filed suit in the Southern District of Ohio in January of 1983 claiming that she had applied for employment at the Clerk of the Court of Common Pleas office, Hamilton County, Ohio, and the Hamilton County Auditor and Recorder's office, and that she was not considered for a position in any of the offices because of her lack of affiliation with the Republican Party. The Defendants are the elected officeholders of these offices, and are Republicans. Ms. Avery invoked the jurisdiction of the District Court under 28 U.S.C. 1343(4). On January 16, 1985, the District Court granted the Defendants' motion for summary judgment, and denied the Plaintiff's motion for summary judgment. The opinion of the District Court is reported at 604 F.Supp. 1356 (S.D. Ohio 1985).

An appeal was taken to the Court of Appeals for the Sixth Circuit and that Court held on March 20, 1986 that *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), did not preclude elected officials from ". . . weigh[ing] political factors such as party allegiance along with other factors in making subjective hiring judgments" (Slip Opinion, p. 2a herein).

The Sixth Circuit noted that the First Amendment prohibits official hiring based *solely* on political affiliation, but it does not "establish a hard and fast employment rule against weighing political factors . . ." (Slip Opinion, p. 2a herein). To have extended *Elrod* and *Branti* to the hiring decision, the Court of Appeals stated, would ". . . require abolition of hiring systems for office workers in thousands of legislative, executive and judicial offices across the country. In order to prevent patronage under the present systems, the courts would have to constitutionalize a civil service system and oversee its operation . . ." (Slip Opinion, p. 7a herein). The Court acknowledged however, that the ". . . statistical evidence in the record bears out the elected official's testimony and the Plaintiff's argument that the system operates to give preference to Republicans . . ." (Slip Opinion, p. 4a herein). The preference results in workforces that are "overwhelmingly" Republican: 210 hires in the Clerk's office, two of whom were Democrats; 62 hires in the Recorder's office in the same period, five of whom were Democrats, and 160 hires in the Auditor's office, three of whom were Democrats (Slip Opinion, p. 4a herein).

STATEMENT OF FACTS

A. Petitioner's Disqualification.

The essential facts recited in the District Court's opinion are fairly stated. The District Court correctly described Ms. Avery's several efforts in applying for employment at the Courthouse offices of the Respondents, and her contacts with a Republican Party Ward Chairman who told her that if a job became available ". . . maybe a fellow Republican would help [her] out with a job if she were affiliated 'in some way' with the Republican Party." *Avery* v. *Jennings*, 604 F.Supp.

at 1358. The District Court correctly noted Ms. Avery's political preference. She considers herself a Democrat and generally favors the Democratic Party and Democratic candidates. The record further indicates that Ms. Avery does not wish to become a Republican (Court of Appeals' Appendix, p. 126, hereinafter referred to as App., p. ____). Her understanding of her quarrel with the Respondents is that ". . . it is just that I applied for a job and I think I have the right to have my application looked at that same as someone who is a Republican" (App., p. 126). If offered a job in any of the Respondents' offices she would take it (App., p. 129). However, she wouldn't join the Republican Party in order to get the job because ". . . it's not fair" (App., p. 129).

The Circuit and District Courts recognized that Respondents prefer hiring Republicans and that they rely on personal recommendations in filling employment positions from a network of political associates and friends. Jobs are not publicly advertised and the hiring process is a closed one (*Id.*, p. 1359). The Circuit Court described in some detail how the hiring system worked (Slip Opinion, pp. 2a-3a herein).

As the Circuit Court found ". . . since Plaintiff was unconnected with this network her application was not considered" (Slip Opinion, p. 2a herein).

B. The Political Preference Hiring Pattern.

Ms. Avery has demonstrated that the effect of the preference for hiring Republicans is to nearly exclude anyone, such as herself, who is not a Republican, or who will likely not become a Republican. For example, Mr. Jennings, the Clerk of Courts of Hamilton County, hired

over 210 persons from January 1, 1976 to October, 1983, only two of whom were Democrats (1%). Both of these Democrats later became payroll contributors to the local Republican Party. Indeed, the vast majority of Jennings' employees were payroll contributors to Mr. Jennings' political party (233 out of 271 employees) (App. p. 53).

The hiring pattern in the Auditor's office indicated that from January 1, 1976 to October, 1983, 160 persons were employed of whom, the Auditor stated, three were Democrats (1.8%). Similarly, the Recorder's office had hired 62 persons from January 1, 1976 to October, 1983, five of whom were Democrats, only one of whom remained employed at the time of Ms. Avery's suit (App., p. 89; Slip Opinion, p. 4a herein).

Plaintiff's own compilation of employment and voter registration data confirmed the pattern of employment that was acknowledged by the Respondents. Petitioner presented to the Courts below the voter registration status of persons employed by each office from 1976 to October, 1983 (App., p. 82). The data indicated that in February, 1983, the Clerk's office employed a total of 270 persons, only one of whom was a Democrat (App., p. 87).

In February, 1983, in the Auditor's office there were 163 persons employed, only three of whom were registered as Democrats (App., p. 85). Only one of the 36 employees of the Recorder's office as of February, 1983, was a Democrat (App., p. 89). By comparing the above employee registration proportions with the party registration figures in the job application pool at the Hamilton County Employment Office (14.7% Republican, Democrat 10.6%, not registered 31.8%, not voting in either primary 26.5%) (App., p. 91), and the voter registration of all voters in Hamilton County, (19.77%

Republican, 18.96% Democrat, 41% neither primary) one may readily conclude that non-Republicans have been systematically excluded by Respondents' hiring practices.

C. The Acknowledged Preference.

Ms. Avery also provided the lower Court with undisputed evidence of how the hiring patterns described above were realized.

"I would favor hiring qualified Republicans" stated Mr. Jennings in his answers to interrogatories. ". . . [A]ll things being equal, if I had another person who was a Republican, who was just as qualified, I would hire the Republican . . ." (App., p. 163). Mr. DeCourcy has stated ". . . I think all things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected, if for no other reason . . ." (App., p. 145). Mr. Held in response to the inquiry concerning his preferring Republicans stated ". . . I would hope they'd be Republicans (persons he would hire) but the way you're wording the question isn't quite correct. All things being equal, common sense tells you that because of personal loyalty, which is a prerequisite anywhere, from the taxpayer's point of view, from civil service to enthusiasm, it just works better when people tend to have the same philosophy" (App., pp. 196-197).

D. The Proffered Justifications Of Patronage.

The Respondents have indicated not only a strong preference for hiring Republicans; they have also advanced a number of rationales that would suggest that patronage hiring is connected to a number of other in-

terests. All Respondents are elected office holders. Mr. DeCourcy stated that he had a preference for hiring people that would help him get re-elected (App., p. 145). Mr. Jennings offered that he would not expect his employees to say anything detrimental in his electoral campaigns (App., p. 161). Mr. Eyrich, chairman of the Republican Party, made no bones about his expectations of patronage employees working for their employers' campaigns. "He better," Mr. Eyrich said (App., p. 210). For the sake of financing their campaigns, the Defendants' employees contribute money, albeit Jennings insisted that contributing is not a condition of employment (App., p. 165). ". . . The more money that the Party can generate, the better they are going to be able to operate . . ." (App., p. 182).

The ability to raise money, in turn, is dependent on the ability of Ward Chairmen to get employment for politically active and committed persons in their Ward.

> Sure. I'm sure all ward chairmen are interested in, whether you want to call it a constituency or whatever you want to call it, I'm sure they're interested in making as many people in that ward or township, whatever it is, making them happy, you know.
>
> . . . .
>
> Q. And part of the effectiveness of a ward chairman is being able, on occasion, to get people jobs?
>
> A. Well, yes, I'm sure that that has something to do with it, certainly, yeah . . .
>
> (App., pp. 184-185).

George Eyrich concurs that employment possibilities

and recruiting political labor and money go hand in hand (App., pp. 209-210).

Another rationale offered by the Defendants is that patronage, the money, the political labor, and the political commitment that it generates is essential for the maintenance of the two-party system which is critical to the American political process (App., p. 211). Jennings stated ". . . I think the two party system . . . is the greatest thing that we have going for us in the country and if we ever lose the two party system, I can only say that we only have one thing left and that's some kind of an 'ism' and I'm not interested in that kind of an 'ism', I'm interested in Americanism" (App., p. 157).

A final rationale in support of patronage is that Respondents strongly believe that patronage hiring results in a more efficient work force (App., pp. 158, 212). "You can fire patronage employees, you can't fire Civil Service workers" (App., p. 203).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is in conflict with decisions of this Court.

The Circuit Court's refusal to apply *Elrod* v. *Burns*, 427 U.S. 347 (1970), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), to patronage hiring is error.

In *Elrod* v. *Burns*, the Supreme Court held that employees in the Cook County Sheriff's office were discharged in violation of their rights under the First Amendment where the basis of their discharge was their refusal to join, support, or obtain the sponsorship of the Democratic Party. *Id.* at 375. Sponsorship generally was available only to those who joined or supported the

party. *Id.* at 355. Writing for a plurality of the Court, Justice Brennan found that patronage dismissals infringe upon the constitutionally protected freedoms of belief and association by restraining employees from joining and supporting the party of their choice, and by coercing affiliation with, and support of, the party in power. *Id.* at 355. There are, however, other effects of patronage that were noted in *Elrod*.

> The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.
>
> *Id.* at 356.

According to *Elrod*, in order to constitute a violation of the First Amendment, the coercive effect on political affiliations of viewpoints need not be demonstrated. It is merely the prospect of governmental manipulation that transgresses the Constitution. ". . . Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.* at 359. *Elrod* dismissed the proffered justifications of political patronage because they were not of the quality of paramount and

vital state interests that would outweigh the infringement on First Amendment rights. The Court rejected the arguments of efficiency and effectiveness of public employees, *Id.* at 364, the need for political loyalty of employees, *Id.* at 367, and the argument that patronage preserved the democratic process. *Id.* at 368.

In *Branti* v. *Finkel*, 445 U.S. 507 (1980), Justice Stevens, writing for a majority of the Court, addressed two issues not resolved in *Elrod*. First, the Court considered the constitutionality of a requirement that an employee obtain the sponsorship of a member of the dominant political party when there was no overt attempt to coerce the employee into changing his affiliations or supporting a political party. The Court held that limiting *Elrod* to situations in which an attempt is made to coerce employees into joining or supporting a political party would eliminate the blatant tactics of coercion associated with patronage discharges, but would not eliminate the subtle coercion of beliefs that results from the knowledge that one must have a sponsor in the dominant political party in order to retain employment. The Court concluded that permitting such coercion would emasculate the principles established in *Elrod*. *Id.* at 516.

The case at bar is very similar factually to *Branti*. In that case the Court considered sponsorship by a political party as a condition to public employment. The Court held that the requirement of such sponsorship was unconstitutional. The depositions of Respondents demonstrate that informal sponsorship and referral by a political friend of Respondents is required before one is hired by them. This referral system, although informal, imposes the requirement of sponsorship which was banned in *Branti*.

Elrod and *Branti* are consistent with a long line of other Supreme Court decisions which have held that public employment hiring decisions or the granting of other government benefits may not infringe constitutionally protected speech or associations. In *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), the court held:

> [Even] though a person has no "right" to a valuable governmental benefit and even though the government may deny him a benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests or especially his interest in freedom of speech. For if government could deny a benefit to a person because of his constitutionally-protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

The Supreme Court has long recognized the First Amendment principle that ". . . Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office or that no federal employee shall attend Mass or take any active part in missionary work . . .". *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947).

The constitutional history on this issue had steadfastly held that political or religious considerations of nearly every variety have no place in the hiring decision for public employment.

In *Wieman* v. *Updegagraff*, 344 U.S. 183 (1952), the Court held unconstitutional a statute requiring state officers and employees to take a loyalty oath that they were not and had not been affiliated for five years im-

mediately preceding the oath with organizations listed by the Attorney General as subversive. The statute was struck down on overbreath grounds because within its grasp there were a number of forms of associations and activities protected by the First Amendment. Justice Frankfurter in his concurring opinion noted with reference to school teachers that:

> . . . such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for cautions and timidity in their associations by potential teachers . . . .
>
> *Id.* at 195.

The vice of loyalty oaths is the same vice present in patronage hiring. Faced with a sign on the door that says "Only Democrats (or Republicans) need apply," the job applicant may be sorely tempted to fashion his political views for the sake of a job.[1]

In *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), the Court held a state Board of Bar Examiners may not exclude an applicant for membership in the Bar for lack of good character solely on the grounds that the applicant was a former member

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[1] The Court earlier, in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1942), had recognized the effects of governmental activities that impinge on political viewpoints of the community-at-large. ". . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

of the Communist Party. The Court noted that ". . . We need not enter into a discussion whether the practice of law is a 'right' or a 'privilege'. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." *Id.* at 239. In regard to Schware's application, the Court held ". . . Obviously an appellant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 239.

In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court held in violation of the First Amendment a Maryland statute which required all public employees to declare their belief in God. The Court again held that there could be no trade off between one's freedom of belief and a government job. *Id.* at 496.

In *United States* v. *Robel*, 389 U.S. 258 (1967), the Court struck down on First Amendment overbreath grounds a statute which made it a federal crime for a communist to be employed in a plant that had been designated by the Secretary of Defense as a defense facility. The Court in *Robel* gave specific recognition to the right of association. ". . . The operative facts upon which the job disability depends is the exercise of an individual's right of association which is protected by the First Amendment." *Id.* at 263. ". . . Section 5(1)(d) puts appellee to the choice of surrendering his organized affiliation, regardless of whether his membership threatened the security of a defense facility, or giving up his job." *Id.* at 265. *See further Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). In *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court again reaffirmed the now deeply embedded principle that the First Amendment prohibits the encouragement or discouragement of po-

litical preferences on behalf of governmental job applicants or governmental employees.

The holding of the Sixth Circuit in this case is inconsistent with the history of this Court's First Amendment decisions. The Sixth Circuit clearly held that one's political associations or political identity can be the basis for disqualification for a public employment position, yet the disqualification is justified by the interests of ". . . finding good employees, maintaining and extending personal and political relationships [and] creating cooperation and harmony among employees . . ." (Slip Opinion, p. 7a herein). These interests were held in *Elrod* to not justify patronage discharges. *Id.* at 364. Nor can they justify patronage hirings.

The reasoning of the Sixth Circuit that political factors may be weighed along with other factors in making subjective hiring judgments does not disguise the fact that one's political beliefs will be the determinant in obtaining employment in a political patronage system. Where the test of "all things being equal . . . I would hire the Republican" (App., p. 163) is allowable, the reality is non-Republicans need not apply. That is the reality in the Hamilton County offices. Republicans are hired and non-Republicans are not, and the reason is not a matter of any job qualification or any non-political consideration. The reason one gets a job, and another does not is because of political beliefs and affiliations.

The awful specter that the Sixth Circuit conjured up, in the event that patronage hiring was held unconstitutional, of the Courts constitutionalizing ". . . a civil service system and [then] oversee[ing] its operation . . ." (Slip Opinion, p. 8a herein) is not inevitable. There are alternatives to civil service. Likewise the history of Title

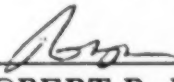
VII, 42 U.S.C. 2000e *et seq.* does not reveal that employers have been disabled from hiring appropriate workforces having been divested of the right to discriminate on the basis of race, sex, religion and national origin.

CONCLUSION

The Sixth Circuit decision is thoroughly inconsistent with the long line of cases beginning with *United Public Workers* v. *Mitchell, supra,* and through *Branti* v. *Finkel, supra.* The most recent reaffirmation of the principle that public employment is not to interfere with political beliefs occurred in *Chicago Teachers Union, Local No. 1* v. *Hudson,* ____ U.S. ____, 54 L.W. 4231 (March 4, 1986). The Sixth Circuit decision wrongly authorizes government to dispense government employment to persons who have what are regarded as favorable political associations or beliefs. The Sixth Circuit decision wrongly imposes the burden on job seekers to show that the illegal criterion was the exclusive reason for being denied employment. The rule has long been established in this Court that where a Plaintiff shows that "but for" the illegal criterion, such as race, he or she would have retained or obtained employment, the burden has been met. *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273, 283 (1976). Here, in spite of there being in reality, a 99% effective patronage hiring system, the Court of Appeals requires a showing of 100% before concluding that the hiring method violates the First Amendment. Ms. Avery having demonstrated in the record that "but for" her lack of affiliation with the local Republican party she would have obtained employment has shown a violation of the First

Amendment. To require additional proof is without precedent. The "all or nothing" rule of the Court of Appeals is an invitation to pretext, and without foundation in First Amendment history. Petitioner asks that this Court grant the petition for certiorari and reverse the judgment of the Sixth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit has been served upon James W. Harper, Assistant Prosecuting Attorney, Room 420, Hamilton County Court House, 1000 Main Street, Cincinnati, Ohio 45202, by ordinary United States mail this 2 day of May, 1986.

ROBERT B. NEWMAN

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-3075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH L. AVERY, *Plaintiff-Appellant*, v. ROBERT JENNINGS, JOHN E. HELD, JOSEPH DECOURCY, JR., *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed March 20, 1986

Before: MERRITT and MARTIN, Circuit Judges; and JOHNSTONE, Chief District Judge.*

MERRITT, Circuit Judge. The question presented here is one of first imprssion: To what extent does the first amendment principle prohibiting political *discharge* of government employees, established in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), apply to political *hiring* decisions by local elected officials? We hold that although the first amendment prohibits official hiring policies based solely on political affiliation, it does not constututionalize civil service standards or establish a hard and fast employ-

* The Honorable Edward H. Johnstone, Chief Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

ment rule against weighing political factors. Neither Congress, a state legislature, nor a local administrator may "enact a regulation" against hiring members of a particular political party, *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947), or exacting a loyalty oath, *Weiman* v. *Updegraff*, 344 U.S. 183 (1952), but elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments.

I.

Deborah Avery appeals the District Court's grant of summary judgment for the defendants. There is no genuine issue as to the facts.

The three defendants are members of the Republican Party in Hamilton County, Ohio, and hold the locally elected positions of Clerk of the Court of Common Pleas (Jennings), County Recorder (Held), and County Auditor (DeCourcy). Plaintiff Avery, a member of the Democratic party, applied to each for a clerical job as a secretary, clerk, or office helper. None of the officials knew of her political affiliation.

The political affiliation of a job applicant is taken into account in the hiring process in a round-about sort of way. As jobs become available, the official for the most part fills the vacancies informally on an *ad hoc* basis with friends, relatives, or acquaintances, or with the friends or relatives of political allies. Since plaintiff was unconnected with this network, her application was not considered.[1]

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[1] Plaintiff's brief fairly sets out the way the system works:

> The way the hiring system works is best demonstrated by the examples of those recently hired. From January 1, 1983, to October 6, 1983, Robert Jennings hired 20 people. Steven Crawford was hired on the recommendation of Adeline Womack the court reporter to the

Each of the elected officials testified that he had no firm rule or policy forbidding the hiring of Democrats, and that he usually did not inquire into party affiliation. They also testified, however, that the informal hiring system operates to prefer Republicans and that since they are Republican office holders this preference is natural and reasonable in their view. For example, Jennings testified that he "would favor hiring qualified Republicans" for his office. DeCourcy stated that "all

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Republican Judge, Norbert Nadel. Susan Horn was hired at the suggestion of her father who is Jennings' Supervisor in the Automobile Title Department. Ms. Horn is a Republican. Steven Kirschner, son of Leonard Kirschner, the Chief Assistant of the Appellate Division of the County Prosecutor's Office, was another hired. Jill Leis, daughter of Judge Simon Leis, was hired. Judge Leis is a Republican. Patrick Maloney, son of the former State Senator and present County Administrator, a Republican was hired. One James Nichols, a manager of a night club where the Republican 9th Ward Club held meetings was the next employee. Mr. Jennings had known Mr. Nichols for a "long, long time." Laurie Peck, who is related in some way to Judge John Peck was recommended by John Bailey who was ". . . always active in Ray Shannon's campaign[s] . . ." Judge Shannon is a Republican Judge in the Court of Appeals. Kelley Raabe was hired on the recommendation of her mother who works for Jennings in the Automobile Title Department. Karen Rosen, the daughter of the Republican Judge Jack Rosen, was hired in this period. A political supporter of Jennings, Ellsworth Solomon, who has ". . . always helped me [Jennings], he has always put signs in his yard and things like that . . ." was hired. Bill Schoenfeld, a brother of the attorney and a cousin of another Jennings employee was hired. Mary Trimpe, a former employee, was reemployed. Barbara Morand, wife of attorney Leo Morand, who was a Republican precinct executive in the 25th Ward when Jennings was Ward Chairman was hired in the Auto Title Department as a clerk typist. William Becker, an "Old Republican" whom Jennings has known since they were kids was hired as a criminal bailiff. Cleary Buchert was referred to Jennings by the Chief Bailiff in the Criminal Division, however Jennings has known Buchert's family for "a lot of years." Buchert's grandfather and Jennings' father were both precinct executives together in the 25th Ward. Buchert was hired as bailiff. Scott then was referred by his father-in-law who works in the County Commissioners [sic] office. Whenever Jennings ran for an elective office the father-in-law "was always in my [Jennings'] corner." This is the fashion in which people have been typically hired during the tenure of Mr. Jennings.

Appellant's Brief at 5-7 (citations omitted).

things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected." And Held stated that "it just works better when people have the same philosophy."

The statistical evidence in the record bears out the elected officials' testimony and the plaintiff's argument that the system operates so as to give preference to Republicans. Discovery taken during pretrial proceedings revealed that defendants' offices were staffed overwhelmingly with Republicans, with a sprinkling of Democrats. For example, Jennings' office had hired 210 persons from January 1, 1976 through October, 1983, only two of whom were registered Democrats. Similar patterns were shown for the offices of Held and DeCourcy: The Recorder's Office had hired 62 persons during the same period, five of whom were Democrats. The Auditor's office had hired 160 persons during the same period, five of whom were Democrats. The Auditor's office had hired 160 persons during the same period; three of them were Democrats.

The District Court granted summary judgment in favor of the defendants on several alternative grounds. First, the District Court held that the Supreme Court's invalidation of politically-motivated discharges in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), does not apply to hiring practices but only to discharge. Second, that plaintiff had failed to satisfy the requirements for making out a first amendment violation under other principles of first amendment law relating to public employees. Third, that in order for plaintiff to show a first amendment violation she must show that the defendants deliberately refused to hire her because of her political beliefs and party affiliation, which she had failed to do since the evidence

showed that none of the defendants had any knowledge of her beliefs or affiliation.

II.

In reviewing a grant of summary judgment the appellate court must view the record in the light most favorable to the party adversely affected. *Bishop* v. *Wood*, 426 U.S. 341, 347-48 (1976). Appellee's brief appears at any rate to accept Avery's version of the facts presented on summary judgment. In this case, that means accepting that defendants had a general practice of hiring those applicants who were friends or who were referred by political allies leading to a disporportionate number of Republican employees. The question presented is thus whether, in light of *Elrod* and *Branti*, such a practice unconstitutionally infringes the first amendment rights of applicants who are not seriously considered because they are not within this informal network.

In *Elrod* v. *Burns*, a newly elected Democratic Sheriff discharged Republican employees of the Cook County, Illinois Sheriff's Department. The sheriff required them to switch their allegiance to the Democratic party and agree to work for or contribute money to the Democrats. 427 U.S. at 355. The Supreme Court found that this practice violated the first amendment rights of the employees, but did not issue a majority opinion. The plurality (consisting of Justices Brennan, White and Marshall) found that two interests were implicated in the case: the individual employee's right to express political beliefs, and the interest of the political system in wide-open, robust and uninhibited debate. Thus, discharging employees because of their political affiliations was "tantamount to coerced belief," *id.*, and as such violated the fundamental interest in free competi-

tion in ideas by stifling debate and by granting one side a significant advantage in that competition. 427 U.S. at 355-56. Justice Stewart's concurrence, joined by Justice Blackmun, limited its scope and hence the court's holding (*see Marks* v. *United States*, 430 U.S. 180, 193 (1977)) to nonpolicymaking, nonconfidential employees discharged because of political beliefs or affiliation. 427 U.S. at 375.

Branti v. *Finkel* clarified the Court's holding in *Elrod*. The Court went beyond *Elrod* to find the politically-motivated discharge of public employees improper except where "party affiliation is an appropriate requirement for effective performance of the public office involved." 445 U.S. at 518. In dissent Justice Powell argued that the historical place of patronage in American politics, and its importance in encouraging participation in the political process, made the patronage system worthy of more deference than the majority opinion showed. *Id.* at 521-34. Others have made the same argument. *See, e.g.*, Moeller, *The Supreme Court's Quest for Fair Politics*, 1 Const'l Commentary 203, 213-219 (1984) (endorsing Powell's approach); Piven, *Federal Policy and Urban Fiscal Strain*, 2 Yale L. & Pol'y Rev. 291, 302-311 (1984) (decline of patronage system in big cities has deprived minorities and poor of the opportunities for advancement and political participation it provided).

Although the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation. Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of

other legitimate governmental concerns. *Compare Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (invalidating statute restricting employment of communists) *with Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding limits on use of sound trucks in political campaigns) and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor laws to use of children for distribution of religious literature). *See also* L. Tribe, American Constitutional Law 580-81 (1978). In the instant case the officials in question had not firm rule, regulation, or established policy foreclosing employment based on political affiliation, but their hiring system had the effect of giving weight to party affiliation.

There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Weiman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes — finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government.

Elrod and *Branti* did not affect normal patronage hir-

ing systems in the United States because they were strict political affiliation discharge cases. Invalidation of informal hiring networks like those in the instant case because they lead to disproportionate representation of one political party or to a disproportionate number of liberals or conservatives would require abolition of the hiring systems for office workers in thousands of legislative, executive, and judicial offices across the country. In order to prevent patronage under the present systems, the courts would have to constitutionalize a civil service system and oversee its operation. There is no precedent for this reading of the first amendment. Balancing the harm sought to be remedied — the tendency of present systems to prefer particular political parties in different offices — against the legitimate needs of elected officials to hire in some manner effective employees who will not be blind to the public nature of the work and the political needs of their employer, we conclude that the hiring systems used by the defendants did not abridge plaintiff's rights of free speech under the first amendment. Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

Deborah L. AVERY, et al., Plaintiffs,
v.
Robert JENNINGS, et al., Defendants.

No. C-1-83-0099.

United States District Court,
S.D. Ohio, W.D.

Jan. 16, 1985.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

CARL B. RUBIN, Chief Judge.

This case is before the Court on cross motions for summary judgment (docs. 10 and 11), which present the Court with a difficult and novel question: Do the Defendants' hiring practices impermissibly infringe upon the first and fourteenth amendment rights of the Plaintiff, who sought, but was not considered for, positions in which her political affiliation would not affect her job performance? Both parties have filed memoranda in opposition to the adverse motions (docs. 15 and 19), and plaintiff has filed a reply memorandum in support of her motion (doc. 20). The cross motions are therefore ripe for decision. S.D.Ohio R. 4.0.2.

I. Findings of Fact

(1) The plaintiff, Deborah Louise Avery, applied for a position in the defendants' offices on December 21, 1982 by filing an application for employment with the Hamilton County Employee Services Office, in the

Hamilton County Courthouse, Cincinnati, Ohio. That same day, plaintiff unsuccessfully attempted to introduce herself to each of the three defendants, Robert Jennings, Clerk of the Court of Common Pleas, John E. Held, County Recorder, and Joseph DeCourcy, Jr., County Auditor.[1]

(2) A day or two later, plaintiff contacted Republican Party Headquarters to learn the name of the Republican Party Ward Chairman for her area. She was given the name of Hank Zureick, a bailiff at the Hamilton County Courthouse. Plaintiff telephoned Mr. Zurieck, who asked her whether she was a Democrat or Republican, then told her it would not mean anything when she replied "Democrat." Mr. Zureick informed the plaintiff that he was not the ward chairman for her area, and he referred her to Mr. James Gibson, Director of the Hamilton County Department of Employee Services. Although Mr. Zureick and other ward chairmen sometimes recommend persons for employment in the defendants' offices, they have no hiring authority.

(3) Plaintiff contacted Mr. Gibson on December 23, 1982. He told her there were no job vacancies at that time.

(4) On December 29, 1982, plaintiff sent letters to all three defendants in which she introduced herself as a laid-off steelworker who had applied for a job through the personnel office. The letter requested an interview and accompanied a resume showing that plaintiff had actually been a clerical worker at a foundry, that she had both clerical and secretarial experience, and that she had an associate's degree in secretarial studies. Plaintiff did not receive a reply from any of the defendants' offices.

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[1] The Court will take judicial notice of the fact that the three defendants are Republicans. *See*, Fed.R.Evid. 201.

(5) Plaintiff called Mr. Zureick again on January 14, 1983, and told him that she was thinking of becoming a Republican. Mr. Zureick referred her to the ward chairman for her area, Tom Puckett. When plaintiff called Mr. Puckett, she spoke only to Mrs. Puckett, who asked her if she was looking for a job and warned her that there were no vacancies. Plaintiff did not talk to Tom Puckett.

(6) Plaintiff placed a third telephone call to Mr. Zureick, who denied that plaintiff would have to be a Republican to get a job at the courthouse, but said that when jobs did open up, "maybe a fellow Republican could help [her] out with a job" if she were affiliated "in some way" with the Republican Party. (Avery deposition at 39-40).

(7) Four days later, on January 18, 1983, the plaintiff filed suit against the three defendants, claiming that her political beliefs had disqualified her from consideration for employment in their offices.

(8) Plaintiff first registered to vote in 1976 and voted in the general elections in 1976 and 1977. As a result of her failure to vote in any general election after 1977, plaintiff's name was removed from the list of registered voters on August 8, 1980. Plaintiff re-registered to vote on December 21, 1982. As of August of 1983, plaintiff had never registered to vote in a Democratic primary, but plaintiff considers herself a Democrat.

(9) Four weeks elapsed between the time plaintiff filed her application for employment and the time she filed suit against the defendants. During that time period there were no job vacancies for clerical or secretarial positions in any of the three defendants' offices, or in any other office in the Hamilton County Courthouse. Between the date the suit was filed in January of 1983 and the end of September of 1983,

vacancies in all three defendants' offices were filled, without considering applications on file with the Employee Services Office.

(10) Defendant Held has been the Hamilton County Recorder since 1974. His office employs approximately thirty to thirty-six people. No vacancies ever occur, as such, but when the work load gets too heavy, a new person is hired. Such a position would not be publicly advertised, nor would the Hamilton County Employee Services office be contacted for applications. Positions are filled with persons who have been personally recommended to defendant Held by people he knows, other employees, ward chairmen of both political parties, judges, and the heads of other departments in the courthouse. Prospective employees are interviewed by Mr. Held or his Chief Deputy, and the final hiring decision is always made by Mr. Held. A person applying for a job in Mr. Held's office is not asked her political preference, and a person who volunteered that she was a Democrat would not thereby be excluded from employment. Mr. Held's office has employed Democrats.

(11) Defendant Jennings has been the Clerk of Courts since 1961, when he was appointed to fill an unexpired term. He has since been elected six times. Job vacancies in Mr. Jennings' office are filled both through personal recommendations and through the Hamilton County Employee Services Office. Republican Party Headquarters does not refer prospective employees or send cards signed by Republican ward chairmen. Job openings are not advertised publicly. An applicant meets with both Mr. Jennings and Bob Rudig, the Administrator of the Office. Neither man asks the applicant her political preference. Mr. Jennings prefers to hire Republicans, because he wants employees who are loyal to him, and he assumes that most people who refer ap-

plicants to him refer Republican applicants. Once employed, employees are not required to contribute to the Republican Party or to work for the re-election of Mr. Jennings or other Republican office holders. Mr. Jennings' office has employed Democrats.

(12) Defendant DeCourcy has been the County Auditor since 1971. When a vacancy occurs in the auditor's office, Mr. DeCourcy tries to fill it by promoting a present employee. If that is not possible, and if the job is a non-technical one, he consults with his employees to determine whether they know of anyone they could recommend. If that course fails, Mr. DeCourcy tells the supervisor of the department with the job opening to call the Employee Services Office to send people over to interview. Although the ultimate hiring decision is made by Mr. DeCourcy, the supervisor does the interviewing and evaluating of prospective employees. When an applicant has been informally referred to the auditor's office, Mr. DeCourcy will meet with the person first. When an applicant has been referred by the Employee Services Office, the supervisor of the department conducts the initial interview. Republican Party Headquarters plays no role in suggesting or recommending people for employment in the auditor's office, nor does it send employment cards signed by ward chairman. No one in the Auditor's office checks the voting record of prospective employees. Mr. DeCourcy would prefer to have Republicans working for him because he assumes Republican employees would be more interested in helping him get re-elected. Although people who refer job applicants may mention the prospective employee's political affiliation, Mr. DeCourcy and his supervisors do not discuss political activity or political loyalty of job applicants. Once employed, employees are not encouraged to contribute

to the Republican Party. Mr. DeCourcy's office has employed Democrats.

(13) All three defendants emplcy persons with qualifications similar to the plaintiff's to fill a number of clerical and secretarial positions. Defendant Held was in Florida when plaintiff's letter to him arrived in his office, and he did not see it until after plaintiff filed this suit. Defendant Jennings never received plaintiff's letter, although he did see the copy attached to the complaint. Defendant DeCourcy recalled talking to the plaintiff and telling her to apply through the Employee Services Office, but he never saw the letter that plaintiff sent to his office. Mr. Held could not tell without talking to the plaintiff whether she would be qualified to work in his office. Mr. Jennings thought plaintiff's resume indicated that she was qualified to do a number of jobs in his office, but that she would not be considered because she had filed suit against him. Similarly, Mr. DeCourcy stated that he would not consider hiring the plaintiff because she had filed suit and was antagonistic towards his office.

(14) According to James Gibson, the county's Board of Commissioners laid off fourteen employees, four of them clerical workers, in the month in which plaintiff filed her application. There were no job vacancies at that time, and the laid-off employees would have been considered first for any openings that might have occurred in any county office.

II. Opinion

The first question which the Court must decide on a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court reveal any genuine issue as to any material fact. Fed. R.Civ.P. 56(c). If any such

issue is found, the motion must be denied, for the Court deciding a Rule 56 motion cannot try issues of fact but may merely determine whether they exist. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). In the instant case, the parties agree that there are no factual disputes remaining and that summary judgment is appropriate.

A few of the factual allegations in plaintiff's complaint have been disproved through the discovery process; for example, the complaint alleges that plaintiff's ward chairman asked her whether she was a Democrat or a Republican, but plaintiff's own deposition indicates that she never spoke to the ward chairman for her area. Similarly, the complaint states that applicants for employment in county offices must be recommended by the appropriate party precinct executive and approved by the appropriate ward chairman, through use of a card indicating political preference. All three defendants stated that they did not accept the cards from prospective employees and that the cards were not considered in the hiring process.

There are a few other examples of conclusory factual allegations that were made in the complaint but disproved through the depositions of the plaintiff and the defendants. Plaintiff has produced no evidence to support these allegations in the complaint, so the apparent factual conflict between the complaint and the other facts on file will not require the Court to find that any *genuine* issues of material fact still remain to be tried. Rule 56 requires that the party opposing a motion for summary judgment set forth "specific facts showing that there is a genuine issue for trial." Summary judgment is still possible where the plaintiff's conclusory allegations in his complaint and affidavit are insufficient to rebut the evidence offered by the defendants. *Patmon* v. *Van*

Dorn Co., 498 F.2d 544, 547 (6th Cir. 1974); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.1980) (party opposing the motion "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful.") And, although summary judgment is often inappropriate where issues of intent and motive are involved, as they are in this case, summary judgment should be granted if there are no issues of fact left to be determined. *Ackerman* v. *Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir.1982) (affirming grant of summary judgment for defendant in age discrimination suit).

Neither party has pointed out, nor can the Court find, any genuine issue of material fact remaining to be tried in this case. Summary judgment is therefore appropriate, and the Court must decide which of the moving parties is entitled to judgment as a matter of law.

The plaintiff's cause of action is premised upon the basic principle that the government may not deny a person a valuable benefit, such as employment, on a basis that infringes her constitutionally protected interest in freedom of speech. *See Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1971); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-85, 17 L.Ed.2d 629 (1967).

A public employee's first amendment rights are not unlimited, however. In *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the Supreme Court recognized that the state, as an employer, had an interest in regulating the speech of its employees, and that it was necessary to balance the interest of the state in promoting efficient public service against the interest of the employee in commenting upon matters of public concern. In that case, a teacher was impermissibly discharged for writing

and publishing a letter critical of his employer; although the letter contained misstatements, no showing was made that the employee knowingly or recklessly made the false statements. *Id.* at 574, 88 S.Ct. at 1737.

Statements made in private are entitled to no less protection under the first amendment, according to *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979). In *Givhan*, the employee's criticism of the school's practices were directed to the principal, in his office. The Court held that this private expression deserved the same balancing of interests as that afforded the public expression in *Pickering;* the Court also noted, however, that the elements to be weighed in the balance might be different. *Id.* at 415 n. 4, 99 S.Ct. at 696 n. 4. Those factors—manner, time, and place of the expression—were considered in the balance of interests in *Connick* v. *Myers*, 461 U.S. 138, 153, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983). First, the Court found that most of the questionnaire, the distribution of which precipitated the employee's dismissal from public employment, was not directed to matters of public concern; only the one question that was on a matter of public concern entitled the employee to scrutiny of her discharge by a federal court. *Id.* at 146-47, 103 S.Ct. at 1689-90. The Court weighed the nature of the expression, the impediment the expression caused in the employee's ability to perform her responsibilities, the disruption of the public office, the place in which the questionnaire was distributed, and the context in which the expression took place. In light of all these elements, the Court characterized the questionnaire as an employee grievance over office policy, which was entitled to very limited first amendment protection. Weighing that minimal protection against the effects of

the questionnaire, which were to undermine office relationships, erode the employer's authority, and disrupt the office, the Court held that the employee's discharge did not offend the first amendment. *Id.* at 154, 103 S.Ct. at 1693.

A balancing test similar to that articulated in *Pickering* was employed by the Supreme Court in its first of two opinions invalidating discharges of public employees on the basis of their political beliefs or affiliation. In *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a fragmented Court struck down the practice of the Sheriff of Cook County, Illinois, of replacing non-civil-service employees in his office with members of his own political party, if the existing employees were not members of, or supported by a leader of, the newly-elected Sheriff's own party. Justice Brennan wrote the plurality opinion, which held that patronage dismissals were inconsistent with the first amendment, as they indirectly deny a person his constitutionally-protected rights of free speech and association. *Id.* at 358-59, 96 S.Ct. at 2682-83. Recognizing that the prohibition against encroachment of first amendment protections is not absolute, however, Justice Brennan examined the interests offered as justifications for continuation of the patronage dismissal practices at issue in *Elrod*, weighed them against the infringement upon first amendment rights posed by the dismissals, and concluded that the only valid justification offered was the need to insure that the policies approved by the electorate are effectively implemented, thus the only permissible patronage dismissals were those in policymaking positions. *Id.* at 372, 96 S.Ct. at 2689. Justices Stewart and Blackmun, whose votes were necessary to the plurality decision, contributed an extremely short opinion concurring in the judgment, but declining to join the plurality's blanket

condemnation of the patronage system. In particular, Justice Stewart refused to offer any views on the "constitutional validity of a system that confines the *hiring* of some governmental employees to those of a particular political party." *Id.* at 374, 96 S.Ct. 2690 (emphasis added).

In the second of the two patronage cases, *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Court refused to limit *Elrod* to cases in which employees are threatened with discharge unless they change their political allegiance, holding instead that the employees need only prove that they were discharged "solely for the reason that they were not affiliated with or sponsored by" the employer's political party. 445 U.S. at 516-17, 100 S.Ct. at 1293-94. Indeed, rather than limiting the holding of *Elrod*, the Court limited the exception expressed in *Elrod* allowing consideration of party affiliation where the position involved policymaking. After *Branti*, the only exception to the ban on patronage dismissals applies to positions in which party affiliation is an "appropriate requirement for the effective performance of the public office." *Id.* at 518, 100 S.Ct. at 1294. As the positions involved in that case were as assistant public defenders, the Court held the discharges violative of the first amendment. *Id.* at 519-20, 100 S.Ct. at 1295-96.

Together, the *Elrod* and *Branti* cases represent a very narrow subclass of the cases involving discharge from public employment as a result of the exercise of first amendment rights. Where the discharge of a public employee is based solely on her political affiliation, the Supreme Court has already performed the required balancing of interests and determined that the only governmental interest sufficient to justify such a discharge is the need to insure that the will of the elec-

torate is carried out. Therefore, unless party affiliation affects the discharged employee's ability to effectively perform her job, a politically-motivated discharge represents an impermissible infringement on the employee's first amendment rights. No decided case, however, has extended the rationale of these two cases to a situation involving an employment decision other than a discharge, although one circuit has held that *Elrod* and *Branti* may apply to invalidate a transfer and reassignment that was the "substantial equivalent of dismissal." *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir.1980). Furthermore, recent Supreme Court treatment of *Elrod* and *Branti* evidences no desire to extend the application of those cases beyond their particular facts. *E.g.*, *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (citing only for the proposition that employees may not be coerced into working for political candidates); *Minnesota State Board* v. *Knight*, 465 U.S. 271, ____, ____, 104 S.Ct. 1058, 1067, 1078, 79 L.Ed.2d 299 (1984) (citing Justice Powell's dissent in *Branti).*

To recognize the plaintiff's claim that the defendants' failure to hire her, allegedly on the basis of her political affiliation, was an encroachment on her first amendment rights under the line of cases discussed above would require, therefore, a broad and unwarranted extension of those cases beyond their facts and precedential effect. The facts of the instant case simply do not bring it within this particular subclass of cases.[2] Absent any persuasive arguments in favor of extending the applicability of *Elrod* and *Branti* to cases involving employment decisions other than discharges, this Court declines to do so.

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[2] There is no dispute, however, that the positions for which plaintiff applied were *not* positions in which political affiliation is an appropriate job qualification.

The plaintiff's case will, therefore, be decided under broader precepts of first amendment rights of public employees.

In pleading her case, plaintiff has focused on the general principle of *Keyishian* and *Perry* and the specific application of *Elrod* and *Branti*. Little focus has been put upon the limitations and the balancing reflected in *Pickering*, *Givhan*, and *Connick*. More importantly, however, the plaintiff has ignored another principle that must be factored into any examination of the interplay between a public employee's first amendment rights and a public employer's interest in maintaining an effective work force: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) (unanimous decision).

In the *Mt. Healthy* case, a nontenured teacher's contract was not renewed following several instances of conduct, at least one of which was protected under the first amendment. The teacher brought suit, and the district court found that since his protected activity played a substantial part in the decision not to renew his contract, his constitutional rights had been violated. The Supreme Court found that the district court's analysis stopped one step short of completion: After the discharged employee shows that his conduct was constitutionally protected and that the conduct was a substantial factor in the decision not to rehire him, the burden of proof shifts to the defendant to show that it would have reached the same decision in the absence of the protected conduct. *Id.* at 287, 97 S.Ct. at 576. As the lower courts had not applied the entire test, the Supreme Court vacated their judgments and remanded the case.

The three steps in the *Mt. Healthy* analysis were laid out and described in some detail in *Reichert* v. *Draud*, 701 F.2d 1168, 1170 (6th Cir.1983), *citing Hildebrand* v. *Board of Trustees*, 662 F.2d 439, 442-43 (6th Cir.1981), *cert. denied*, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982):

> (1) The threshold question is whether the plaintiff's conduct deserves constitutional protection.
>
> (2) If the court finds that an employee's conduct was protected by the first amendment, the finder of fact must determine whether [the action taken was] because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision.
>
> (3) Once the employee meets this burden [as outlined in 2 above] the burden is on the employer to prove that the action the employee is complaining about would have taken place absent the protected conduct. (citations omitted).

In *Hildebrand*, a teacher at a state university was denied tenure after he had criticized the curriculum and run for a position on an advisory committee at the university. The Sixth Circuit assumed, without deciding that the faculty member's activities were protected by the first amendment, but held that the evidence produced by the university clearly showed that the faculty member's denial of tenure was not based upon his exercise of rights. *Id.* at 444. The Court reached a similar conclusion in *Reichert*, where a teacher claimed that schedule changes were the result of her protected activities as president of the teachers' association. Again, the Court made no specific finding as to the protected status of the conduct involved, but held that the plaintiff had failed

to show that the conduct played a substantial part in the decision to change her schedule. 701 F.2d at 1171. Applying the three-part test of *Mt. Healthy* to the plaintiff's case leads this Court to the same conclusion reached by the Sixth Circuit in both *Reichert* and *Hildebrand*.

(1) *Conduct.* The right to associate with the political party of one's choice is an activity protected by the first and fourteenth amendments. *Kusper* v. *Pontikes*, 414 U.S. 51, 56-67, 94 S.Ct. 303, 307-13, 38 L.Ed.2d 260 (1973). In light of the particular facts of this case, however, defendants argue that there have been no protected activities by the plaintiff. Although plaintiff claims to be a registered Democrat, she has never actually registered to vote in a primary, nor, in fact, had she voted in the general elections in the years immediately preceding the filing of this suit. However, the plaintiff now alleges that she is a Democrat, and that she wishes to remain a Democrat, even if employed by the defendants; although the defendants question the strength of plaintiff's political commitment, they offer no evidence to refute her claims of allegiance. The Court will assume, therefore, that plaintiff has met her burden of proof as to the first prong of the test.

(2) *Substantial Factor.* The second prong of the test requires the plaintiff to prove that her protected conduct was a "substantial" or "motivating" factor in the defendants' failure to hire her. "That burden is not insignificant. A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponent in the election." *Nekolny* v. *Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed. 139 (1982). Mere proof that some protected conduct took place is not sufficient to meet the burden

obviously, for in both *Reichert* and *Hildebrand* the plaintiffs had engaged in activities that were arguably related to their first amendment rights to associate freely and express their opinions on matters of public concern. At the very least, it seems apparent that the plaintiff must prove that the decision-makers *knew* of the protected activity. The predicate requirement of knowledge has been recognized by the Third Circuit. In *Laskaris* v. *Thornburgh*, 733 F.2d 260 (3d Cir. 1984), a discharged public employee presented evidence that his replacement was a Republican, as were the defendants in the case. Without sufficient evidence that any of the defendants even knew that plaintiff was a Democrat, the fact of the replacement's political affiliation would not in itself support an inference that the plaintiff's discharge was politically motivated. The court held, therefore, that the plaintiff had failed to establish that his political affiliation was a substantial or motivating factor behind his discharge. *Id.* at 265-66.

Plaintiff concedes that none of the defendants asked if she was a Republican or a Democrat, that no one in any of their offices so inquired, and that she did not volunteer that information to them. The only person who posed that question to plaintiff was a ward chairman for a ward other than plaintiff's, but that gentleman plays no part in the hiring practices of the defendants' offices, other than to occasionally recommend persons for employment, as do other of the defendants' friends and co-workers. Even if the defendants had tried to learn of plaintiff's political associations through public records, they would have found only that plaintiff had never registered to vote in a Democratic primary election. Plaintiff has produced absolutely no evidence that any defendant knew of her political affiliation during the time period between the filing of her

job application and the filing of this lawsuit. Therefore, the Court holds that the plaintiff has not met her burden of proof on the second prong of the *Mt. Healthy* analysis; there is no evidence on this record that plaintiff's conduct, her political affiliaiton with the Democratic Party, was a substantial factor in plaintiff's failure to obtain employment in any of the defendant's offices.

(3) *Showing by Defendants.* Even if plaintiff had met the burden required of her under *Mt. Healthy*, the Court holds that the defendants have shown by a preponderance of the evidence that their failure to hire plaintiff would have occurred even absent her protected conduct. Clerical workers were actually laid-off in the month in which plaintiff filed her application; these people would have been given the first opportunity to fill any vacancies that might have occurred. However, there were no vacancies during the relevant time period. In addition, none of the defendants even saw the letters sent to them by plaintiff until after she had filed her lawsuit, so none of these potential employers had been given any opportunity to consider plaintiff for employment in their offices. The failure to hire plaintiff was a result of the lack of vacancies and the lack of opportunity to consider her for employment. On the facts of this case, plaintiff's political affiliation actually played no part in her failure to find employment with the defendants.

Although plaintiff's complaint alleges violations of the fourteenth amendment as well as the first, no separate equal protection argument was made in any of plaintiff's pleadings. For the same reasons that the Court finds no violation of the plaintiff's first amendment rights, we would also find no violation of the plaintiff's fourteenth amendment rights. Plaintiff has not produced any

evidence that she has been treated differently as a result of her association with the Democratic Party.

III. Conclusions of Law

(A) Jurisdiction over this suit brought under 42 U.S.C. § 1983 is conferred upon this Court by 28 U.S.C. § 1343(3) and (4).

(B) *Elrod* and *Branti* represent a very narrow subcategory of cases involving first amendment rights in the public employment area; these cases are applied only where a public employee has been discharged solely because of his or her political affiliation. No cause of action has yet been recognized under these two cases for a failure to hire because of political affiliation.[3]

(C) Plaintiff failed to establish that her political affiliation was a substantial factor behind her inability to obtain employment with the defendants; she therefore failed to meet her burden of proof under the *Mt. Healthy* case. Even if she had met this burden, and the burden of proof had then shifted to the defendants, the defendants produced uncontroverted evidence sufficient to meet their heavy burden of showing that plaintiff's inability to obtain employment would have remained the same in the absence of the protected conduct. Plaintiff has failed, therefore, to establish any infringement upon her first or fourteenth amendment rights.

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[3] Plaintiff brought her suit as a class action, and the motion to certify the class is pending at this time. However, as the Court holds that this plaintiff has failed to establish any infringement on her first amendment rights and that no court has ever recognized the cause of action asserted on behalf of the class, the class allegations in the complaint and the unresolved motion to certify the class present no impediment to this Court's deciding this case on its merits. *Marx* v. *Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) ("It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action.).

(D) In accordance with conclusions (A), (B), and (C) above, the plaintiff's motion for summary judgment is denied, and the defendants' is granted.

IT IS SO ORDERED.

No. 85-1817

(2)

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DEBORAH L. AVERY,

Petitioner,

vs.

ROBERT JENNINGS, JOHN E. HELD,
JOSEPH DeCOURCY, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the First Amendment to the United States Constitution require elected Republican officeholders to consider the employment application of a person who considers herself a Democrat when (1) no job vacancies exist; (2) no employment applications are being considered, and (3) the elected officials have no knowledge of the applicant's political affiliation or beliefs.

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No. 85-1817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DEBORAH L. AVERY,

Petitioner,

vs.

ROBERT JENNINGS, JOHN E. HELD,
JOSEPH DeCOURCY, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion of the District Court is reported at 604 F.Supp. 1356 (S.D., Ohio, 1985) and is reprinted as Appendix A. The Opinion of the Court of Appeals has yet to be reported, and is reprinted as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 20, 1986. This Court has jurisdiction to review the Judgment below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNTIED STATES:
FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Ms. Avery's Statement of Facts correctly notes that the essential facts recited in the District Court's Opinion are fairly stated.

On December 21, 1982, Ms. Avery filed an application for employment with the Hamilton County Employee Services Office, seeking a clerical or secretarial position. On December 23, 1982, Ms. Avery was told by Mr. Gibson, Director of Employee Services, that there were no clerical or secretarial jobs available. In fact during the four weeks which elapsed between the time Ms. Avery filed her application for employment and the time she filed suit there were no job vacancies for clerical or secretarial positions in the offices of Mr. Jennings, Mr. Held or Mr. DeCourcy, or for that matter in any other office in the Hamilton County Courthouse.

Ms. Avery claims that she was not considered for employment because she is a registered Democrat; votes in the Democratic primary; generally votes in general elections for Democratic candidates; and does not wish to change her party registration, voting interests or general political beliefs. (Paragraph 12, Complaint) However, not only did Mr. Jennings, Mr. Held and Mr.

DeCourcy have no knowledge of Ms. Avery's political affiliation or beliefs it is doubtful that they even knew of her existence. Nevertheless, had they inquired they would have found that Ms. Avery in fact was not a registered Democrat, voted infrequently and was unable to identify any political belief.

Ms. Avery filed suit in the District Court for the Southern District of Ohio on January 18, 1983, claiming jurisdiction under 28 U.S.C. § 1343(4). The case was submitted to the Trial Court on cross motions for summary judgment and arguments of counsel. On January 16, 1985, the District Court granted the Defendants' motion and denied that of the Plaintiff. The opinion of the District Court is reported at 604 F.Supp. 1356 (S.D., Ohio, 1985). An appeal was taken to the Court of Appeals for the Sixth Circuit which Court affirmed the District Court's judgment on March 26, 1986.

REASONS FOR DENYING THE WRIT

A PERSON SEEKING PUBLIC EMPLOYMENT DOES NOT ESTABLISH THAT HER POLITICAL AFFILIATION OR BELIEFS ARE A SUBSTANTIAL OR MOTIVATING FACTOR IN A PUBLIC EMPLOYER'S FAILURE TO CONSIDER HER EMPLOYMENT APPLICATION WHEN (1) NO JOB VACANCIES EXIST; (2) NO EMPLOYMENT APPLICATIONS ARE BEING CONSIDERED, AND (3) THE PUBLIC EMPLOYER HAS NO KNOWLEDGE OF THE APPLICANT'S POLITICAL AFFILIATION OR BELIEFS.

Ms. Avery seeks to have this Court grant a Writ of Certiorari to consider to what extent, if any, the First Amendment principle prohibiting political discharge of certain types of governmental employees established in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkle*, 445 U.S. 507 (1980), applies to political hiring decisions by local elected officials.

While the Trial Court and Court of Appeals discussed the applicability of *Elrod* and *Branti*, *supra*, both courts also recognized in the first instance that Ms. Avery had failed to establish that her political affiliation and beliefs had anything to do with the consideration of her employment application. In view of the total absence of any factual support for Ms. Avery's claim, this Court should deny her Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Respondents believe that the Decision of the Court of Appeals for the Sixth Circuit should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-3075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH L. AVERY,
Plaintiff-Appellant,
v.
ROBERT JENNINGS, JOHN E. HELD, JOSEPH DECOURCY, JR.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed March 20, 1986

Before: MERRITT and MARTIN, Circuit Judges; and JOHNSTONE, Chief District Judge.*

MERRITT, Circuit Judge. The question presented here is one of first imprssion: To what extent does the first amendment principle prohibiting political *discharge* of government employees, established in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), apply to political *hiring* decisions by local elected officials? We hold that although the first amendment prohibits official hiring policies based solely on political affiliation, it does not constututionalize civil service standards or establish a hard and fast employ-

* The Honorable Edward H. Johnstone, Chief Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

ment rule against weighing political factors. Neither Congress, a state legislature, nor a local administrator may "enact a regulation" against hiring members of a particular political party, *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947), or exacting a loyalty oath, *Weiman* v. *Updegraff*, 344 U.S. 183 (1952), but elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments.

I.

Deborah Avery appeals the District Court's grant of summary judgment for the defendants. There is no genuine issue as to the facts.

The three defendants are members of the Republican Party in Hamilton County, Ohio, and hold the locally elected positions of Clerk of the Court of Common Pleas (Jennings), County Recorder (Held), and County Auditor (DeCourcy). Plaintiff Avery, a member of the Democratic party, applied to each for a clerical job as a secretary, clerk, or office helper. None of the officials knew of her political affiliation.

The political affiliation of a job applicant is taken into account in the hiring process in a round-about sort of way. As jobs become available, the official for the most part fills the vacancies informally on an *ad hoc* basis with friends, relatives, or acquaintances, or with the friends or relatives of political allies. Since plaintiff was unconnected with this network, her application was not considered.[1]

---

[1] Plaintiff's brief fairly sets out the way the system works:

> The way the hiring system works is best demonstrated by the examples of those recently hired. From January 1, 1983, to October 6, 1983, Robert Jennings hired 20 people. Steven Crawford was hired on the recommendation of Adeline Womack the court reporter to the

Each of the elected officials testified that he had no firm rule or policy forbidding the hiring of Democrats, and that he usually did not inquire into party affiliation. They also testified, however, that the informal hiring system operates to prefer Republicans and that since they are Republican office holders this preference is natural and reasonable in their view. For example, Jennings testified that he "would favor hiring qualified Republicans" for his office. DeCourcy stated that "all

---

Republican Judge, Norbert Nadel. Susan Horn was hired at the suggestion of her father who is Jennings' Supervisor in the Automobile Title Department. Ms. Horn is a Republican. Steven Kirschner, son of Leonard Kirschner, the Chief Assistant of the Appellate Division of the County Prosecutor's Office, was another hired. Jill Leis, daughter of Judge Simon Leis, was hired. Judge Leis is a Republican. Patrick Maloney, son of the former State Senator and present County Administrator, a Republican was hired. One James Nichols, a manager of a night club where the Republican 9th Ward Club held meetings was the next employee. Mr. Jennings had known Mr. Nichols for a "long, long time." Laurie Peck, who is related in some way to Judge John Peck was recommended by John Bailey who was ". . . always active in Ray Shannon's campaign[s] . . ." Judge Shannon is a Republican Judge in the Court of Appeals. Kelley Raabe was hired on the recommendation of her mother who works for Jennings in the Automobile Title Department. Karen Rosen, the daughter of the Republican Judge Jack Rosen, was hired in this period. A political supporter of Jennings, Ellsworth Solomon, who has ". . . always helped me [Jennings], he has always put signs in his yard and things like that . . ." was hired. Bill Schoenfeld, a brother of the attorney and a cousin of another Jennings employee was hired. Mary Trimpe, a former employee, was reemployed. Barbara Morand, wife of attorney Leo Morand, who was a Republican precinct executive in the 25th Ward when Jennings was Ward Chairman was hired in the Auto Title Department as a clerk typist. William Becker, an "Old Republican" whom Jennings has known since they were kids was hired as a criminal bailiff. Cleary Buchert was referred to Jennings by the Chief Bailiff in the Criminal Division, however Jennings has known Buchert's family for "a lot of years." Buchert's grandfather and Jennings' father were both precinct executives together in the 25th Ward. Buchert was hired as bailiff. Scott then was referred by his father-in-law who works in the County Commissioners [sic] office. Whenever Jennings ran for an elective office the father-in-law "was always in my [Jennings'] corner." This is the fashion in which people have been typically hired during the tenure of Mr. Jennings.

Appellant's Brief at 5-7 (citations omitted).

things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected." And Held stated that "it just works better when people have the same philosophy."

The statistical evidence in the record bears out the elected officials' testimony and the plaintiff's argument that the system operates so as to give preference to Republicans. Discovery taken during pretrial proceedings revealed that defendants' offices were staffed overwhelmingly with Republicans, with a sprinkling of Democrats. For example, Jennings' office had hired 210 persons from January 1, 1976 through October, 1983, only two of whom were registered Democrats. Similar patterns were shown for the offices of Held and DeCourcy: The Recorder's Office had hired 62 persons during the same period, five of whom were Democrats. The Auditor's office had hired 160 persons during the same period, five of whom were Democrats. The Auditor's office had hired 160 persons during the same period; three of them were Democrats.

The District Court granted summary judgment in favor of the defendants on several alternative grounds. First, the District Court held that the Supreme Court's invalidation of politically-motivated discharges in *Elrod* v. *Burns*, 427 U.S. 327 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), does not apply to hiring practices but only to discharge. Second, that plaintiff had failed to satisfy the requirements for making out a first amendment violation under other principles of first amendment law relating to public employees. Third, that in order for plaintiff to show a first amendment violation she must show that the defendants deliberately refused to hire her because of her political beliefs and party affiliation, which she had failed to do since the evidence

showed that none of the defendants had any knowledge of her beliefs or affiliation.

II.

In reviewing a grant of summary judgment the appellate court must view the record in the light most favorable to the party adversely affected. *Bishop* v. *Wood*, 426 U.S. 341, 347-48 (1976). Appellee's brief appears at any rate to accept Avery's version of the facts presented on summary judgment. In this case, that means accepting that defendants had a general practice of hiring those applicants who were friends or who were referred by political allies leading to a disporportionate number of Republican employees. The question presented is thus whether, in light of *Elrod* and *Branti*, such a practice unconstitutionally infringes the first amendment rights of applicants who are not seriously considered because they are not within this informal network.

In *Elrod* v. *Burns*, a newly elected Democratic Sheriff discharged Republican employees of the Cook County, Illinois Sheriff's Department. The sheriff required them to switch their allegiance to the Democratic party and agree to work for or contribute money to the Democrats. 427 U.S. at 355. The Supreme Court found that this practice violated the first amendment rights of the employees, but did not issue a majority opinion. The plurality (consisting of Justices Brennan, White and Marshall) found that two interests were implicated in the case: the individual employee's right to express political beliefs, and the interest of the political system in wide-open, robust and uninhibited debate. Thus, discharging employees because of their political affiliations was "tantamount to coerced belief," *id.*, and as such violated the fundamental interest in free competi-

tion in ideas by stifling debate and by granting one side a significant advantage in that competition. 427 U.S. at 355-56. Justice Stewart's concurrence, joined by Justice Blackmun, limited its scope and hence the court's holding (*see Marks* v. *United States*, 430 U.S. 180, 193 (1977)) to nonpolicymaking, nonconfidential employees discharged because of political beliefs or affiliation. 427 U.S. at 375.

Branti v. *Finkel* clarified the Court's holding in *Elrod*. The Court went beyond *Elrod* to find the politically-motivated discharge of public employees improper except where "party affiliation is an appropriate requirement for effective performance of the public office involved." 445 U.S. at 518. In dissent Justice Powell argued that the historical place of patronage in American politics, and its importance in encouraging participation in the political process, made the patronage system worthy of more deference than the majority opinion showed. *Id.* at 521-34. Others have made the same argument. *See, e.g.*, Moeller, *The Supreme Court's Quest for Fair Politics*, 1 Const'l Commentary 203, 213-219 (1984) (endorsing Powell's approach); Piven, *Federal Policy and Urban Fiscal Strain*, 2 Yale L. & Pol'y Rev. 291, 302-311 (1984) (decline of patronage system in big cities has deprived minorities and poor of the opportunities for advancement and political participation it provided).

Although the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation. Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of

other legitimate governmental concerns. *Compare Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (invalidating statute restricting employment of communists) *with Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding limits on use of sound trucks in political campaigns) and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor laws to use of children for distribution of religious literature). *See also* L. Tribe, American Constitutional Law 580-81 (1978). In the instant case the officials in question had not firm rule, regulation, or established policy foreclosing employment based on political affiliation, but their hiring system had the effect of giving weight to party affiliation.

There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Weiman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes — finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government.

Elrod and *Branti* did not affect normal patronage hir-

ing systems in the United States because they were strict political affiliation discharge cases. Invalidation of informal hiring networks like those in the instant case because they lead to disproportionate representation of one political party or to a disproportionate number of liberals or conservatives would require abolition of the hiring systems for office workers in thousands of legislative, executive, and judicial offices across the country. In order to prevent patronage under the present systems, the courts would have to constitutionalize a civil service system and oversee its operation. There is no precedent for this reading of the first amendment. Balancing the harm sought to be remedied — the tendency of present systems to prefer particular political parties in different offices — against the legitimate needs of elected officials to hire in some manner effective employees who will not be blind to the public nature of the work and the political needs of their employer, we conclude that the hiring systems used by the defendants did not abridge plaintiff's rights of free speech under the first amendment. Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

Deborah L. AVERY, et al., Plaintiffs,
v.
Robert JENNINGS, et al., Defendants.

No. C-1-83-0099.

United States District Court,
S.D. Ohio, W.D.

Jan. 16, 1985.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

CARL B. RUBIN, Chief Judge.

This case is before the Court on cross motions for summary judgment (docs. 10 and 11), which present the Court with a difficult and novel question: Do the Defendants' hiring practices impermissibly infringe upon the first and fourteenth amendment rights of the Plaintiff, who sought, but was not considered for, positions in which her political affiliation would not affect her job performance? Both parties have filed memoranda in opposition to the adverse motions (docs. 15 and 19), and plaintiff has filed a reply memorandum in support of her motion (doc. 20). The cross motions are therefore ripe for decision. S.D.Ohio R. 4.0.2.

I. Findings of Fact

(1) The plaintiff, Deborah Louise Avery, applied for a position in the defendants' offices on December 21, 1982 by filing an application for employment with the Hamilton County Employee Services Office, in the

Hamilton County Courthouse, Cincinnati, Ohio. That same day, plaintiff unsuccessfully attempted to introduce herself to each of the three defendants, Robert Jennings, Clerk of the Court of Common Pleas, John E. Held, County Recorder, and Joseph DeCourcy, Jr., County Auditor.[1]

(2) A day or two later, plaintiff contacted Republican Party Headquarters to learn the name of the Republican Party Ward Chairman for her area. She was given the name of Hank Zureick, a bailiff at the Hamilton County Courthouse. Plaintiff telephoned Mr. Zurieck, who asked her whether she was a Democrat or Republican, then told her it would not mean anything when she replied "Democrat." Mr. Zureick informed the plaintiff that he was not the ward chairman for her area, and he referred her to Mr. James Gibson, Director of the Hamilton County Department of Employee Services. Although Mr. Zureick and other ward chairmen sometimes recommend persons for employment in the defendants' offices, they have no hiring authority.

(3) Plaintiff contacted Mr. Gibson on December 23, 1982. He told her there were no job vacancies at that time.

(4) On December 29, 1982, plaintiff sent letters to all three defendants in which she introduced herself as a laid-off steelworker who had applied for a job through the personnel office. The letter requested an interview and accompanied a resume showing that plaintiff had actually been a clerical worker at a foundry, that she had both clerical and secretarial experience, and that she had an associate's degree in secretarial studies. Plaintiff did not receive a reply from any of the defendants' offices.

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[1] The Court will take judicial notice of the fact that the three defendants are Republicans. *See*, Fed.R.Evid. 201.

(5) Plaintiff called Mr. Zureick again on January 14, 1983, and told him that she was thinking of becoming a Republican. Mr. Zureick referred her to the ward chairman for her area, Tom Puckett. When plaintiff called Mr. Puckett, she spoke only to Mrs. Puckett, who asked her if she was looking for a job and warned her that there were no vacancies. Plaintiff did not talk to Tom Puckett.

(6) Plaintiff placed a third telephone call to Mr. Zureick, who denied that plaintiff would have to be a Republican to get a job at the courthouse, but said that when jobs did open up, "maybe a fellow Republican could help [her] out with a job" if she were affiliated "in some way" with the Republican Party. (Avery deposition at 39-40).

(7) Four days later, on January 18, 1983, the plaintiff filed suit against the three defendants, claiming that her political beliefs had disqualified her from consideration for employment in their offices.

(8) Plaintiff first registered to vote in 1976 and voted in the general elections in 1976 and 1977. As a result of her failure to vote in any general election after 1977, plaintiff's name was removed from the list of registered voters on August 8, 1980. Plaintiff re-registered to vote on December 21, 1982. As of August of 1983, plaintiff had never registered to vote in a Democratic primary, but plaintiff considers herself a Democrat.

(9) Four weeks elapsed between the time plaintiff filed her application for employment and the time she filed suit against the defendants. During that time period there were no job vacancies for clerical or secretarial positions in any of the three defendants' offices, or in any other office in the Hamilton County Courthouse. Between the date the suit was filed in January of 1983 and the end of September of 1983,

vacancies in all three defendants' offices were filled, without considering applications on file with the Employee Services Office.

(10) Defendant Held has been the Hamilton County Recorder since 1974. His office employs approximately thirty to thirty-six people. No vacancies ever occur, as such, but when the work load gets too heavy, a new person is hired. Such a position would not be publicly advertised, nor would the Hamilton County Employee Services office be contacted for applications. Positions are filled with persons who have been personally recommended to defendant Held by people he knows, other employees, ward chairmen of both political parties, judges, and the heads of other departments in the courthouse. Prospective employees are interviewed by Mr. Held or his Chief Deputy, and the final hiring decision is always made by Mr. Held. A person applying for a job in Mr. Held's office is not asked her political preference, and a person who volunteered that she was a Democrat would not thereby be excluded from employment. Mr. Held's office has employed Democrats.

(11) Defendant Jennings has been the Clerk of Courts since 1961, when he was appointed to fill an unexpired term. He has since been elected six times. Job vacancies in Mr. Jennings' office are filled both through personal recommendations and through the Hamilton County Employee Services Office. Republican Party Headquarters does not refer prospective employees or send cards signed by Republican ward chairmen. Job openings are not advertised publicly. An applicant meets with both Mr. Jennings and Bob Rudig, the Administrator of the Office. Neither man asks the applicant her political preference. Mr. Jennings prefers to hire Republicans, because he wants employees who are loyal to him, and he assumes that most people who refer ap-

plicants to him refer Republican applicants. Once employed, employees are not required to contribute to the Republican Party or to work for the re-election of Mr. Jennings or other Republican office holders. Mr. Jennings' office has employed Democrats.

(12) Defendant DeCourcy has been the County Auditor since 1971. When a vacancy occurs in the auditor's office, Mr. DeCourcy tries to fill it by promoting a present employee. If that is not possible, and if the job is a non-technical one, he consults with his employees to determine whether they know of anyone they could recommend. If that course fails, Mr. DeCourcy tells the supervisor of the department with the job opening to call the Employee Services Office to send people over to interview. Although the ultimate hiring decision is made by Mr. DeCourcy, the supervisor does the interviewing and evaluating of prospective employees. When an applicant has been informally referred to the auditor's office, Mr. DeCourcy will meet with the person first. When an applicant has been referred by the Employee Services Office, the supervisor of the department conducts the initial interview. Republican Party Headquarters plays no role in suggesting or recommending people for employment in the auditor's office, nor does it send employment cards signed by ward chairman. No one in the Auditor's office checks the voting record of prospective employees. Mr. DeCourcy would prefer to have Republicans working for him because he assumes Republican employees would be more interested in helping him get re-elected. Although people who refer job applicants may mention the prospective employee's political affiliation, Mr. DeCourcy and his supervisors do not discuss political activity or political loyalty of job applicants. Once employed, employees are not encouraged to contribute

to the Republican Party. Mr. DeCourcy's office has employed Democrats.

(13) All three defendants employ persons with qualifications similar to the plaintiff's to fill a number of clerical and secretarial positions. Defendant Held was in Florida when plaintiff's letter to him arrived in his office, and he did not see it until after plaintiff filed this suit. Defendant Jennings never received plaintiff's letter, although he did see the copy attached to the complaint. Defendant DeCourcy recalled talking to the plaintiff and telling her to apply through the Employee Services Office, but he never saw the letter that plaintiff sent to his office. Mr. Held could not tell without talking to the plaintiff whether she would be qualified to work in his office. Mr. Jennings thought plaintiff's resume indicated that she was qualified to do a number of jobs in his office, but that she would not be considered because she had filed suit against him. Similarly, Mr. DeCourcy stated that he would not consider hiring the plaintiff because she had filed suit and was antagonistic towards his office.

(14) According to James Gibson, the county's Board of Commissioners laid off fourteen employees, four of them clerical workers, in the month in which plaintiff filed her application. There were no job vacancies at that time, and the laid-off employees would have been considered first for any openings that might have occurred in any county office.

II. Opinion

The first question which the Court must decide on a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court reveal any genuine issue as to any material fact. Fed. R.Civ.P. 56(c). If any such

issue is found, the motion must be denied, for the Court deciding a Rule 56 motion cannot try issues of fact but may merely determine whether they exist. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). In the instant case, the parties agree that there are no factual disputes remaining and that summary judgment is appropriate.

A few of the factual allegations in plaintiff's complaint have been disproved through the discovery process; for example, the complaint alleges that plaintiff's ward chairman asked her whether she was a Democrat or a Republican, but plaintiff's own deposition indicates that she never spoke to the ward chairman for her area. Similarly, the complaint states that applicants for employment in county offices must be recommended by the appropriate party precinct executive and approved by the appropriate ward chairman, through use of a card indicating political preference. All three defendants stated that they did not accept the cards from prospective employees and that the cards were not considered in the hiring process.

There are a few other examples of conclusory factual allegations that were made in the complaint but disproved through the depositions of the plaintiff and the defendants. Plaintiff has produced no evidence to support these allegations in the complaint, so the apparent factual conflict between the complaint and the other facts on file will not require the Court to find that any *genuine* issues of material fact still remain to be tried. Rule 56 requires that the party opposing a motion for summary judgment set forth "specific facts showing that there is a genuine issue for trial." Summary judgment is still possible where the plaintiff's conclusory allegations in his complaint and affidavit are insufficient to rebut the evidence offered by the defendants. *Patmon* v. *Van*

Dorn Co., 498 F.2d 544, 547 (6th Cir. 1974); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.1980) (party opposing the motion "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful.") And, although summary judgment is often inappropriate where issues of intent and motive are involved, as they are in this case, summary judgment should be granted if there are no issues of fact left to be determined. *Ackerman* v. *Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir.1982) (affirming grant of summary judgment for defendant in age discrimination suit).

Neither party has pointed out, nor can the Court find, any genuine issue of material fact remaining to be tried in this case. Summary judgment is therefore appropriate, and the Court must decide which of the moving parties is entitled to judgment as a matter of law.

The plaintiff's cause of action is premised upon the basic principle that the government may not deny a person a valuable benefit, such as employment, on a basis that infringes her constitutionally protected interest in freedom of speech. *See Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1971); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-85, 17 L.Ed.2d 629 (1967).

A public employee's first amendment rights are not unlimited, however. In *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the Supreme Court recognized that the state, as an employer, had an interest in regulating the speech of its employees, and that it was necessary to balance the interest of the state in promoting efficient public service against the interest of the employee in commenting upon matters of public concern. In that case, a teacher was impermissibly discharged for writing

and publishing a letter critical of his employer; although the letter contained misstatements, no showing was made that the employee knowingly or recklessly made the false statements. *Id.* at 574, 88 S.Ct. at 1737.

Statements made in private are entitled to no less protection under the first amendment, according to *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979). In *Givhan*, the employee's criticism of the school's practices were directed to the principal, in his office. The Court held that this private expression deserved the same balancing of interests as that afforded the public expression in *Pickering;* the Court also noted, however, that the elements to be weighed in the balance might be different. *Id.* at 415 n. 4, 99 S.Ct. at 696 n. 4. Those factors—manner, time, and place of the expression—were considered in the balance of interests in *Connick* v. *Myers*, 461 U.S. 138, 153, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983). First, the Court found that most of the questionnaire, the distribution of which precipitated the employee's dismissal from public employment, was not directed to matters of public concern; only the one question that was on a matter of public concern entitled the employee to scrutiny of her discharge by a federal court. *Id.* at 146-47, 103 S.Ct. at 1689-90. The Court weighed the nature of the expression, the impediment the expression caused in the employee's ability to perform her responsibilities, the disruption of the public office, the place in which the questionnaire was distributed, and the context in which the expression took place. In light of all these elements, the Court characterized the questionnaire as an employee grievance over office policy, which was entitled to very limited first amendment protection. Weighing that minimal protection against the effects of

the questionnaire, which were to undermine office relationships, erode the employer's authority, and disrupt the office, the Court held that the employee's discharge did not offend the first amendment. *Id.* at 154, 103 S.Ct. at 1693.

A balancing test similar to that articulated in *Pickering* was employed by the Supreme Court in its first of two opinions invalidating discharges of public employees on the basis of their political beliefs or affiliation. In *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a fragmented Court struck down the practice of the Sheriff of Cook County, Illinois, of replacing non-civil-service employees in his office with members of his own political party, if the existing employees were not members of, or supported by a leader of, the newly-elected Sheriff's own party. Justice Brennan wrote the plurality opinion, which held that patronage dismissals were inconsistent with the first amendment, as they indirectly deny a person his constitutionally-protected rights of free speech and association. *Id.* at 358-59, 96 S.Ct. at 2682-83. Recognizing that the prohibition against encroachment of first amendment protections is not absolute, however, Justice Brennan examined the interests offered as justifications for continuation of the patronage dismissal practices at issue in *Elrod*, weighed them against the infringement upon first amendment rights posed by the dismissals, and concluded that the only valid justification offered was the need to insure that the policies approved by the electorate are effectively implemented, thus the only permissible patronage dismissals were those in policymaking positions. *Id.* at 372, 96 S.Ct. at 2689. Justices Stewart and Blackmun, whose votes were necessary to the plurality decision, contributed an extremely short opinion concurring in the judgment, but declining to join the plurality's blanket

condemnation of the patronage system. In particular, Justice Stewart refused to offer any views on the "constitutional validity of a system that confines the *hiring* of some governmental employees to those of a particular political party." *Id.* at 374, 96 S.Ct. 2690 (emphasis added).

In the second of the two patronage cases, *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Court refused to limit *Elrod* to cases in which employees are threatened with discharge unless they change their political allegiance, holding instead that the employees need only prove that they were discharged "solely for the reason that they were not affiliated with or sponsored by" the employer's political party. 445 U.S. at 516-17, 100 S.Ct. at 1293-94. Indeed, rather than limiting the holding of *Elrod*, the Court limited the exception expressed in *Elrod* allowing consideration of party affiliation where the position involved policymaking. After *Branti*, the only exception to the ban on patronage dismissals applies to positions in which party affiliation is an "appropriate requirement for the effective performance of the public office." *Id.* at 518, 100 S.Ct. at 1294. As the positions involved in that case were as assistant public defenders, the Court held the discharges violative of the first amendment. *Id.* at 519-20, 100 S.Ct. at 1295-96.

Together, the *Elrod* and *Branti* cases represent a very narrow subclass of the cases involving discharge from public employment as a result of the exercise of first amendment rights. Where the discharge of a public employee is based solely on her political affiliation, the Supreme Court has already performed the required balancing of interests and determined that the only governmental interest sufficient to justify such a discharge is the need to insure that the will of the elec-

torate is carried out. Therefore, unless party affiliation affects the discharged employee's ability to effectively perform her job, a politically-motivated discharge represents an impermissible infringement on the employee's first amendment rights. No decided case, however, has extended the rationale of these two cases to a situation involving an employment decision other than a discharge, although one circuit has held that *Elrod* and *Branti* may apply to invalidate a transfer and reassignment that was the "substantial equivalent of dismissal." *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir.1980). Furthermore, recent Supreme Court treatment of *Elrod* and *Branti* evidences no desire to extend the application of those cases beyond their particular facts. *E.g.*, *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (citing only for the proposition that employees may not be coerced into working for political candidates); *Minnesota State Board* v. *Knight*, 465 U.S. 271, ____, ____, 104 S.Ct. 1058, 1067, 1078, 79 L.Ed.2d 299 (1984) (citing Justice Powell's dissent in *Branti*).

To recognize the plaintiff's claim that the defendants' failure to hire her, allegedly on the basis of her political affiliation, was an encroachment on her first amendment rights under the line of cases discussed above would require, therefore, a broad and unwarranted extension of those cases beyond their facts and precedential effect. The facts of the instant case simply do not bring it within this particular subclass of cases.[2] Absent any persuasive arguments in favor of extending the applicability of *Elrod* and *Branti* to cases involving employment decisions other than discharges, this Court declines to do so.

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[2] There is no dispute, however, that the positions for which plaintiff applied were *not* positions in which political affiliation is an appropriate job qualification.

The plaintiff's case will, therefore, be decided under broader precepts of first amendment rights of public employees.

In pleading her case, plaintiff has focused on the general principle of *Keyishian* and *Perry* and the specific application of *Elrod* and *Branti*. Little focus has been put upon the limitations and the balancing reflected in *Pickering*, *Givhan*, and *Connick*. More importantly, however, the plaintiff has ignored another principle that must be factored into any examination of the interplay between a public employee's first amendment rights and a public employer's interest in maintaining an effective work force: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) (unanimous decision).

In the *Mt. Healthy* case, a nontenured teacher's contract was not renewed following several instances of conduct, at least one of which was protected under the first amendment. The teacher brought suit, and the district court found that since his protected activity played a substantial part in the decision not to renew his contract, his constitutional rights had been violated. The Supreme Court found that the district court's analysis stopped one step short of completion: After the discharged employee shows that his conduct was constitutionally protected and that the conduct was a substantial factor in the decision not to rehire him, the burden of proof shifts to the defendant to show that it would have reached the same decision in the absence of the protected conduct. *Id.* at 287, 97 S.Ct. at 576. As the lower courts had not applied the entire test, the Supreme Court vacated their judgments and remanded the case.

The three steps in the *Mt. Healthy* analysis were laid out and described in some detail in *Reichert* v. *Draud*, 701 F.2d 1168, 1170 (6th Cir.1983), *citing Hildebrand* v. *Board of Trustees*, 662 F.2d 439, 442-43 (6th Cir.1981), *cert. denied*, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982):

> (1) The threshold question is whether the plaintiff's conduct deserves constitutional protection.
>
> (2) If the court finds that an employee's conduct was protected by the first amendment, the finder of fact must determine whether [the action taken was] because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision.
>
> (3) Once the employee meets this burden [as outlined in 2 above] the burden is on the employer to prove that the action the employee is complaining about would have taken place absent the protected conduct. (citations omitted).

In *Hildebrand*, a teacher at a state university was denied tenure after he had criticized the curriculum and run for a position on an advisory committee at the university. The Sixth Circuit assumed, without deciding that the faculty member's activities were protected by the first amendment, but held that the evidence produced by the university clearly showed that the faculty member's denial of tenure was not based upon his exercise of rights. *Id.* at 444. The Court reached a similar conclusion in *Reichert*, where a teacher claimed that schedule changes were the result of her protected activities as president of the teachers' association. Again, the Court made no specific finding as to the protected status of the conduct involved, but held that the plaintiff had failed

to show that the conduct played a substantial part in the decision to change her schedule. 701 F.2d at 1171. Applying the three-part test of *Mt. Healthy* to the plaintiff's case leads this Court to the same conclusion reached by the Sixth Circuit in both *Reichert* and *Hildebrand*.

(1) *Conduct*. The right to associate with the political party of one's choice is an activity protected by the first and fourteenth amendments. *Kusper* v. *Pontikes*, 414 U.S. 51, 56-67, 94 S.Ct. 303, 307-13, 38 L.Ed.2d 260 (1973). In light of the particular facts of this case, however, defendants argue that there have been no protected activities by the plaintiff. Although plaintiff claims to be a registered Democrat, she has never actually registered to vote in a primary, nor, in fact, had she voted in the general elections in the years immediately preceding the filing of this suit. However, the plaintiff now alleges that she is a Democrat, and that she wishes to remain a Democrat, even if employed by the defendants; although the defendants question the strength of plaintiff's political commitment, they offer no evidence to refute her claims of allegiance. The Court will assume, therefore, that plaintiff has met her burden of proof as to the first prong of the test.

(2) *Substantial Factor*. The second prong of the test requires the plaintiff to prove that her protected conduct was a "substantial" or "motivating" factor in the defendants' failure to hire her. "That burden is not insignificant. A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponent in the election." *Nekolny* v. *Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed. 139 (1982). Mere proof that some protected conduct took place is not sufficient to meet the burden

obviously, for in both *Reichert* and *Hildebrand* the plaintiffs had engaged in activities that were arguably related to their first amendment rights to associate freely and express their opinions on matters of public concern. At the very least, it seems apparent that the plaintiff must prove that the decision-makers *knew* of the protected activity. The predicate requirement of knowledge has been recognized by the Third Circuit. In *Laskaris* v. *Thornburgh*, 733 F.2d 260 (3d Cir. 1984), a discharged public employee presented evidence that his replacement was a Republican, as were the defendants in the case. Without sufficient evidence that any of the defendants even knew that plaintiff was a Democrat, the fact of the replacement's political affiliation would not in itself support an inference that the plaintiff's discharge was politically motivated. The court held, therefore, that the plaintiff had failed to establish that his political affiliation was a substantial or motivating factor behind his discharge. *Id.* at 265-66.

Plaintiff concedes that none of the defendants asked if she was a Republican or a Democrat, that no one in any of their offices so inquired, and that she did not volunteer that information to them. The only person who posed that question to plaintiff was a ward chairman for a ward other than plaintiff's, but that gentleman plays no part in the hiring practices of the defendants' offices, other than to occasionally recommend persons for employment, as do other of the defendants' friends and co-workers. Even if the defendants had tried to learn of plaintiff's political associations through public records, they would have found only that plaintiff had never registered to vote in a Democratic primary election. Plaintiff has produced absolutely no evidence that any defendant knew of her political affiliation during the time period between the filing of her

job application and the filing of this lawsuit. Therefore, the Court holds that the plaintiff has not met her burden of proof on the second prong of the *Mt. Healthy* analysis; there is no evidence on this record that plaintiff's conduct, her political affiliaiton with the Democratic Party, was a substantial factor in plaintiff's failure to obtain employment in any of the defendant's offices.

(3) *Showing by Defendants.* Even if plaintiff had met the burden required of her under *Mt. Healthy*, the Court holds that the defendants have shown by a preponderance of the evidence that their failure to hire plaintiff would have occurred even absent her protected conduct. Clerical workers were actually laid-off in the month in which plaintiff filed her application; these people would have been given the first opportunity to fill any vacancies that might have occurred. However, there were no vacancies during the relevant time period. In addition, none of the defendants even saw the letters sent to them by plaintiff until after she had filed her lawsuit, so none of these potential employers had been given any opportunity to consider plaintiff for employment in their offices. The failure to hire plaintiff was a result of the lack of vacancies and the lack of opportunity to consider her for employment. On the facts of this case, plaintiff's political affiliation actualiy played no part in her failure to find employment with the defendants.

Although plaintiff's complaint alleges violations of the fourteenth amendment as well as the first, no separate equal protection argument was made in any of plaintiff's pleadings. For the same reasons that the Court finds no violation of the plaintiff's first amendment rights, we would also find no violation of the plaintiff's fourteenth amendment rights. Plaintiff has not produced any

evidence that she has been treated differently as a result of her association with the Democratic Party.

III. Conclusions of Law

(A) Jurisdiction over this suit brought under 42 U.S.C. § 1983 is conferred upon this Court by 28 U.S.C. § 1343(3) and (4).

(B) *Elrod* and *Branti* represent a very narrow subcategory of cases involving first amendment rights in the public employment area; these cases are applied only where a public employee has been discharged solely because of his or her political affiliation. No cause of action has yet been recognized under these two cases for a failure to hire because of political affiliation.[3]

(C) Plaintiff failed to establish that her political affiliation was a substantial factor behind her inability to obtain employment with the defendants; she therefore failed to meet her burden of proof under the *Mt. Healthy* case. Even if she had met this burden, and the burden of proof had then shifted to the defendants, the defendants produced uncontroverted evidence sufficient to meet their heavy burden of showing that plaintiff's inability to obtain employment would have remained the same in the absence of the protected conduct. Plaintiff has failed, therefore, to establish any infringement upon her first or fourteenth amendment rights.

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[3] Plaintiff brought her suit as a class action, and the motion to certify the class is pending at this time. However, as the Court holds that this plaintiff has failed to establish any infringement on her first amendment rights and that no court has ever recognized the cause of action asserted on behalf of the class, the class allegations in the complaint and the unresolved motion to certify the class present no impediment to this Court's deciding this case on its merits. *Marx* v. *Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) ("It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action.).

(D) In accordance with conclusions (A), (B), and (C) above, the plaintiff's motion for summary judgment is denied, and the defendants' is granted.

IT IS SO ORDERED.